MICHIGAN SUPREME COURT

PUBLIC HEARING
September 27, 2012

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CHIEF JUSTICE YOUNG: Welcome to the public hearing on several administrative matters that we have pending. The first of them is Item 1 – 2006-47, and the first speaker is Patrick Clawson. This is a matter whether to adopt several amendments to update those rules to reflect the current use of electronic technology in terms of how the courts are now using them. Welcome.

ITEM 1 - 2006-47 – MCR 1.109 ETC.

MR. CLAWSON: Good morning sir. Thank you very much. My name is Patrick Clawson; I'm a legal investigator and process server. I work in both Flint, Michigan and Washington, D.C. I've been an open government activist for over 35 years. I'm very concerned about the proposals that are pending in this. There are many good things I might add about the pending rulemaking proposals. However, there are some things that I think the Court needs to spend some special time taking a look at that actually creates some barriers for access to court records. I'm concerned that the proposed rules will open up an open-ended money grab by Michigan courts. Right now many Michigan courts do not install any type of public access terminals. So that way they can charge the public every time the public needs access to any kind of case information. Recently I was up in Clare County attempting to serve civil process. I needed to access a case file at the court. I did not know the case number. I was charged a fee just to be able to get the access to the case number much less to inspect the case. Clare County has a similar problem. In Muskegon, the court has removed public access terminals. All of this is part of fee gouging to be blunt – it's a money grab for the Michigan courts for you to be able to have to pay cash to be able to inspect public records. I think the Court's proposal needs to mandate that all Michigan courts must maintain some kind of a public access terminal in their courts so the public can come in and access their property – their public records. In the 61st District Court in Grand Rapids, they've instituted an electronic imaging system. Now if you want to inspect a case over there you actually have to purchase a copy of the entire case file before you can examine any information at the district court. I

had to pay recently $20.00 just to purchase a case file that I did not need to purchase because the court will not permit any kind of public access to the imaging system so that I can review the case documents. I think there's something seriously wrong with that.

JUSTICE MARILYN KELLY: Let me ask you. Sir?

MR. CLAWSON: Yes, Ma'am.

JUSTICE MARILYN KELLY: Is it possible for you to view the actual records rather than the electronic file?

MR. CLAWSON: Well, in Grand Rapids, for instance the 61st, they've begun to image all of their records so the only way you can take a look at it is through the court's terminal and they do not provide a public access terminal. You have to actually pay a fee to get a copy of the entire case printed out.

JUSTICE MARILYN KELLY: Is there any other place that's the case?

MR. CLAWSON: That's the only one I have run into so far here in the state, but it's a disturbing trend I will tell you if that persists. I would encourage the Court to mandate in its rules that any remote online access to court records should involve free access to the registers of action in a case and also to the civil and the criminal indexes. Right now many Michigan courts have put up pay walls. For instance, in Livingston County, if I need to access a civil index, I have to pay an online fee of – I believe its $6.00 just to run a search. Other courts have fees over $10.00 or $12.00 just to run a search to see if a record even exists. The public is best served by having open access on any remote online systems to the registers of actions and to the indexes. If you want to purchase documents, that's an entirely different matter. I would urge the Court to take a hard look at how Oakland County has instituted their electronic filing system and it provides open access, free access, to the registers of action. I can take a look at the case indexes, but if I need to get copies of actual documents that incurs a fee. I don't have a problem with that.

CHIEF JUSTICE YOUNG: Thank you.

MR. CLAWSON: Frankly, it makes it more efficient for the court as well by reducing the administrative burdens. One other element I need to bring to the Court's attention.

CHIEF JUSTICE YOUNG: You need to bring your remarks to a conclusion. You're over your time.

MR. CLAWSON: Okay, sir. Privacy rules in the electronic filing systems have been adopted without any kind of public input and they are now beginning to damage our efforts to be able to locate witnesses, serve process, conduct investigations in this state. The rules need to be amended to provide that the addresses of the litigants are a matter of public record and that there are some personal identifiers in the record such as date of births. We're having a constant problem now with these rules that were adopted without any kind of public input limiting the access to information that investigators and process servers in this state need to do their work.

CHIEF JUSTICE YOUNG: Thank you very much.

MR. CLAWSON: Thank you sir.

CHIEF JUSTICE YOUNG: The next speaker is Elizabeth Kocab.

MS. KOCAB: Good morning your honor. I'm Elizabeth Kocab; I'm general counsel for the Third Circuit Court. And I'm here to comment on proposed MCR 8.119(j)(3)(a) and (j)(4)(b). Those subrules – actually it dovetails on the comments of the gentleman who was just here - those subrules go into what factors a court may take into consideration and calculate in the fee they are charging for access to its records and reproduction of court records. We would object to the language that's currently proposed. The language that's currently proposed would prohibit a court from taking into accounting calculating the fee the cost associated with the purchase and maintenance of any system of technology used to store, retrieve, and reproduce a case record. That language is actually at odds with current proposed legislation – HB 5795 – which would seek to enact proposed MCL 600.1426(5)(b) defines a reasonable fee to include, for example, the courts direct cost of creating, maintaining, processing out, upgrading, access to courts through electronic means, etc. We also know that in the federal system – the PACER system – the federal court – if you look on the PACER website, the fees that are included or are charged are actually not to help support the court in developing and maintaining current case management and online document - retrieval of documents.

In Wayne County, we know that the costs of implementing technology to access an online case management system, for example, are obviously case manager system, and going into efiling, those costs are very, very conservable. For example, in Wayne County our funding unit has bonded $4.5 million for the court to implement the case manager system. And there was approximately $400,000 in costs to upgrade and maintain that system – for bandwidth – even access to the register of actions. That costs money. It costs the court – the county - $14,000 on an annual basis. Our state court administrator recently wrote "trial courts share a common financial interest with their funding units." If you restrict what a trial court can include in assessing reasonable fees, you're actually punishing the funding units. I mean you're restricting the funding units from coming up with cash to help fund it.

CHIEF JUSTICE YOUNG: Can I ask a question?

MS. KOCAB: Yes.

CHIEF JUSTICE YOUNG: How does Wayne charge for access to paper documents?

MS. KOCAB: Well, currently –

CHIEF JUSTICE YOUNG: Just access, not reproduction.

MS. KOCAB: I don't believe there is a cost to –

CHIEF JUSTICE YOUNG: But there is an infrastructure that supports that. You have to have people to pull the files, you have all the administrative overhead of maintaining paper records, right?

MS. KOCAB: Yes.

CHIEF JUSTICE YOUNG: So how is that different in – when you're creating a parallel universe – an electronic universe – why – why is one treated differently than another?

MS. KOCAB: Well, I can think of one significant factor. Those – you might say the infrastructure for – in the paper world, those have existed for many, many, many years. The building, the files, the paper – the cost of those you might say has already been amortized in the system itself. These costs – $4.5 million to implement the system – those are new costs –

CHIEF JUSTICE YOUNG: Um hmm.

MS. KOCAB: and they should – the users of those systems should be asked to pay a reasonable fee to access those systems. Now perhaps in the future once there can be you might say an estimation that the public has pretty much recouped those costs, the fees can be eliminated, but right now funding units are in dire, dire financial straits. We all know this. I mean I think it's fair that users pay – help pay for the systems that they're using. For example, you go into a state park and you're paying a $10.00 fee – a toll bridge – things of that nature.

CHIEF JUSTICE YOUNG: I understand. Please conclude your remarks.

MS. KOCAB: Well, actually my comments have concluded Justice.

CHIEF JUSTICE YOUNG: Thank you.

MS. KOCAB: Thank you very much for your time.

CHIEF JUSTICE YOUNG: Judge Kirk Tabbey.

JUDGE TABBEY: Good morning.

CHIEF JUSTICE YOUNG: Good morning.

JUDGE TABBEY: I know most of you I think. My name is Kirk Tabbey, I'm a district judge. I serve the people of Washtenaw County; I sit in the city of Saline, Pittsfield Township, and the oasis that's Ypsilanti. So I'm glad to be here. I'm here on behalf of the 2006-47. I would call it the first attempt – a launch at trying to make inroads in our – in cleaning up our court rules as we move from – the environment from paper to digital. So that's really the focus of this. I've been on a number of committees, this is a product of more than one, and it's the first go-around at trying to touch in that area. So I think we've touched a few areas that changed a few other issues, and I think there might be some pieces – like you already pulled out 1.109 which is really helpful for electronic signatures. So there might be more of that that you might do with these, but the goal is to move forward. We have a new case management system coming. It was launched in Berrien in August. It's getting five-star reviews. Demonstrations were there at the conference. This is going to provide data that we've not seen before. Other states, of course, have gone through this, but

we're about to. And the rules need to be written by the Supreme Court – this body – and it's important that it be done otherwise there's studies from 2000 on that talk about commerce and what its sold for, what its used for, these decisions need to be made by the Supreme Court. So I think there's good public input. I think the comments that have come in have showed where we need to look at some of the other issues and maybe – maybe there's more time needed to digest those. I think there's issues where we need to tighten up our language. I think we define one term by another term, so I think there's more to do. But this is a first effort to try to put that forward. So I –

CHIEF JUSTICE YOUNG: Are you urging this Court to adopt them or –

JUDGE TABBEY: Urging to adopt with – I think there are some things – I looked at some of the State Bar comments, I have to say, frankly, I don't like to see when we define a term by itself later. You know I think we have some tightening up to do, but I'm urging for adoption of these in general. I know that there were some areas that were touched on that were – that might need some further review so I think it will provide some additional comments, but in general I believe this is our effort to move forward and to make sure that we're ready. I know legislation's been introduced that would give us authority so that came in after, so obviously some changes may need to be made to some language.

JUSTICE MARY BETH KELLY: Judge Tabbey let me just ask you to comment on Mr. Clawson's proposition, if you will, that every court should have open access minimally to the register of actions or to a so-called docket sheet for both criminal and civil even if the funding unit doesn't support that proposition. What is your view of that?

JUDGE TABBEY: I think that's critical. I think that we should support that. I think that that information should be out there – basically a docket information one that's there – that's general public access to – that you know it's there – the indexes if you will. Now if he wants specific things – like he said when you want prints – what we're talking is not prints, but going into a computer system that you have to maintain to make sure this is accurate stuff because they're gonna be selling this information. There's a lot of information out there - we have privacy issues and other things to explore that I think need to – this is a structure so the Supreme Court can decide how it's all – how it's gonna be paid for.

CHIEF JUSTICE YOUNG: But you believe that the – each court should maintain a public kiosk, in effect, to access those core documents.

JUDGE TABBEY: The rules read pretty clearly that this should be public – it's staying with the State Bar crossroads determinations that this information should be public. Now what we're finding when you have a lot of data – I see I'm out of time – I'll finish the question –

CHIEF JUSTICE YOUNG: I understand.

JUDGE TABBEY: when you have a lot of data you need to protect that for a lot of other interests, and I think there's a reasonable argument to be made for the enhanced access piece for fines – for costs to be made. Some states have chosen not to do that, the majority have that have that addressed this. And they worked on it, and I think we can put together a package maybe with – however you choose to move forward with this. I think it's time and the time is coming soon when we'll have the data and we'll need to know what to do with it.

JUSTICE ZAHRA: What about Mr. Clawson's concern about being able to have access to the litigants addresses for purposes of service and the like?

JUDGE TABBEY: I think that we have to be cautious. We have issues when we put something on an ROA for a victim and for trying to keep that knowledge away from a – where a potential domestic violence person – I see the concern, but I do believe that the information is still basically public and out there in many ways. If we restrict it in one area, we have to be careful where we restrict in other areas. I talked to Mr. Clawson.

CHIEF JUSTICE YOUNG: Thank you.

JUDGE TABBEY: He's got some good points, but I do think that – I think that charging – the idea is public access should be free, should be open, and should be there, and that the enhancement piece where we are required to do a lot more work now to maintain this data and make sure it's good should not cost the courts any additional burden.

CHIEF JUSTICE YOUNG: Thank you.

JUDGE TABBEY: Thank you.

CHIEF JUSTICE YOUNG: The next speaker is Jeff Kirkpatrick.

MR. KIRKPATRICK: Good morning. My name is Jeff Kirkpatrick. I'm with the Michigan Court Officer Deputy Sheriff & Process Services Association. My comments now are gonna be very brief. A couple of issues. One I do believe and concur with the prior speakers that the name search and ROA docket information should be and remain accessible by the public at no cost – at least to find out if there is a record – and then if you choose to have a fee for that retrieval of that information then I think there should be some uniformity to that across the state. The other issue that I have is when efiling came about process servers, court officers, file returns everyday, yet we're not able to use the efiling system because we don't have a "P" number. So I think that it would make sense to make sure that when you establish the access to this information that you consider people who use it like the court officers to serve documents maybe are exempt from the cost associated if there is one to do that. And we –

CHIEF JUSTICE YOUNG: Let me – I just want to make sure I understand what you're saying. You can't, as a nonlawyer, make an efiling of a service.

MR. KIRKPATRICK: Correct. Like – and I'll use Oakland County as an example. The only way you can get access to the efiling system is if you are a member of Bar. Well, we're not a member of the Bar, but we submit numerous proofs of service everyday to the court.

CHIEF JUSTICE YOUNG: And you have to do that now in a paper filing, is that it?

MR. KIRKPATRICK: Yes. Yes. When most of our offices – at least those of us that are larger volume offices – we're doing that document imaging in our own offices and it would be a heck of a lot easier just to efile those returns and it would seem to me more effective for the whole system. But it's because of the rules that were set up – and I understand that – but they didn't look I think at the whole stakeholder situation when that was done. I just hope that that they do when they implement this.

JUSTICE ZAHRA: But aren't you making service on behalf of counsel?

MR. KIRKPATRICK: Well, you are, but then we would return the proof of service to either the court or to the counsel, but it's still paper – it's still getting mailed to the court or hand delivered to the court.

JUSTICE ZAHRA: Is there a prohibition though against you using the "P" number of the counsel who retained you to do the efile without a fee?

MR. KIRKPATRICK: Yeah, because then we wouldn't have to have a huge number of log-ins. As I understand the system, the access is given to the person with the "P" number and then they have the user name and password to access that. So I think that to file on behalf of someone –

CHIEF JUSTICE YOUNG: You'd need their password.

MR. KIRKPATRICK: is not a – yeah, I would need their user name and password and, of course, they're not gonna do that. And there's not a mechanism in place at this moment to be able to file – like you're suggesting – using that but having our own user name and password.

CHIEF JUSTICE YOUNG: Okay.

MR. KIRKPATRICK: So that's the extent of my comments and I thank you.

CHIEF JUSTICE YOUNG: Thank you. Those are all of the speakers on Item 1, and so we'll move on to Item 2 which is 2010-34, which is a proposal whether to adopt one or two of alternative proposals to amend MCR 6.419 regarding motions for directed verdict. Jonathan Sacks.

Item 2 – 2010-34 – MCR 6.419

MR. SACKS: Good morning. Jonathan Sacks from the State Appellate Defender Office, and I'm here to speak on behalf of SADO. We do oppose both alternatives. We think it's that they're sort of a response to a problem that isn't there so much. There's this perception that judges are running around granting directed verdicts or issuing directed verdicts and then suddenly the prosecutor can't appeal. And these are terrible decisions and jeopardy attaches and –

CHIEF JUSTICE YOUNG: That's not true?

MR. SACKS: We –

CHIEF JUSTICE YOUNG: That doesn't occur?

MR. SACKS: It might occur maybe twice.

CHIEF JUSTICE YOUNG: We've had a case – we've had cases recently.

MR. SACKS: We don't see it as the sort of overarching problem that requires this sort of broad-based response. If it occurs, it's an incredible minority of situations. I feel like in the six years since I've been following cases at SADO we've seen one case with this issue in all those years. And –

CHIEF JUSTICE YOUNG: We've just had a case on this very issue.

MR. SACKS: No, and that's – that's correct – I'm not saying it never occurs. But the point is, here's the response. The response is let's – there are two responses here. The first response is let's allow the court to hold until afterwards – to hold until after the jury's made the decision. And the problem that we see there is judges aren't gonna do that. I think it's sort of against human nature for a judge to say well I've made this decision and why don't I wait until after the jury comes back with a verdict so that I can be appealed. I think if a judge really is gonna take that extra step they're going to – they're gonna want to rule right away. But more to the point, it's –

JUSTICE HATHAWAY: What about – excuse me – what about not making the decision until after the close of proofs, but before it goes to the jury?

MR. SACKS: And that might happen and the concern there – and it's the concern of both proposals – is it warps the defense – and that's the underlying problem here.

CHIEF JUSTICE YOUNG: I'm sorry. It does what?

MR. SACKS: It warps the presentation of the defense and that's the underlying problem here for both proposals that – here we have a problem that we're not sure exists on any sort of large level, and let's say you have a judge who says well I'm not sure whether or not I'm going to make a decision on this directed verdict motion for a sufficiency for second-degree

murder, let's wait and see. And then you've got a defense attorney unsure of whether they want to put their client on the stand – unsure of whether they want to call alibi witnesses – unsure of whether they want to call other fact witnesses – because their strategy may be very, very different if first-degree murder is or is not in the mix.

CHIEF JUSTICE YOUNG: My – my – I guess one reaction I have is this – this isn't a mandatory rule, this gives the judge – either of these alternatives gives the judge an opportunity to exercise discretion. If the judge is confident of his or her ruling and sees no point in delaying it, they'll – as they do now, make the determination on the motion, correct?

MR. SACKS: That –

CHIEF JUSTICE YOUNG: If it's a doubtful question, if they're concerned that they're not sure, why wouldn't we want to give the judge that discretion because the alternative, as is currently the case, if they decide incorrectly, it's the end of the case without capacity to correct an error.

MR. SACKS: In the very, very, very rare case where that might happen that is an issue, but –

CHIEF JUSTICE YOUNG: It's a pretty significant one, isn't it?

MR. SACKS: Sure, but the response here creates a much more significant issue which is it is impossible really to put on a defense. If the case is stayed, which is proposal B, a case is stayed for at least 24 hours. I mean we know in actuality with the way the appellate system works let's say four days of transcripts need to be prepared, the Court of Appeals judges need to then evaluate that decision that was made, a jury would need to come back however many weeks later while that's all sorted out, and meanwhile a defense attorney has absolutely no way of knowing what defense to put on. I mean I would say that if the Court is seriously considering one of these proposals, the defense should at least be able to reopen proofs in either event to properly put on their case. But it seems like this is a very, very broad based response that will warp defenses in jury trials at the goal of resolving a problem that, at least based on SADO's experience, I'm not saying it doesn't exist, but I'm saying it is very, very rare, and we need a sort of response, if there is one, that takes into account that rare situation. Thank you.

CHIEF JUSTICE YOUNG: Thank you. Mr. Baughman.

MR. BAUGHMAN: Your honors, Tim Baughman from the Wayne County Prosecutor's Office. On November 6th, *Evans v MI* will be argued in the United States Supreme Court. It still kind of shocks me that they have oral argument on the Election Day in a presidential election year, but there it is.

CHIEF JUSTICE YOUNG: They're Article IIIs.

MR. BAUGHMAN: Pardon?

CHIEF JUSTICE YOUNG: They're Article IIIs.

MR. BAUGHMAN: There you go. And I'll be there arguing that case and, of course, that case was decided by this Court and by the Court of Appeals before that, and if proposal B had been the law none of that would have happened because within the 24-hour period the ruling made by the trial judge in that case, I am confident, would have been reversed. It was egregiously mistaken as to what the elements are. This Court has held that that kind of error is not a directed verdict and that's what the United States Supreme Court's going to decide. But it never would have gotten that far if proposal B had existed. And we would urge if – if the Court's gonna select either A or B, the prosecution would urge B because it gives us a fighting change – it's only a 24-hour window – to try to get the Court of Appeals to either reverse or grant a further stay while they consider it, but it gives us a chance to avoid what may be in sometimes very serious cases an egregious termination for all time of a prosecution by a single judge making an error.

CHIEF JUSTICE YOUNG: Could you address the argument just advanced that this is a – not a real problem – it's rare.

MR. BAUGHMAN: Well, Mr. Sacks may not have seen it much and this Court probably hasn't it much because prosecutors can't appeal directed verdicts other than in the evidence situation where the judge gets the elements wrong. If we are dealing instead with –

CHIEF JUSTICE YOUNG: You couldn't do that even then until *Evans* came along.

MR. BAUGHMAN: Well, we'll find out whether we can do it even then, but if a judge makes a mistake as to what evidence is

necessary to prove an element as in *Smith v Massachusetts*, you can't prove the length of the barrel of the gun unless you have somebody who came in and measured it, and then the prosecutor comes in and says wait a minute here's a case that says a testimony as to what kind of gun it is – it's you know a revolver – is sufficient – can't be repaired unless there's a rule like A which allows our revisitation, or B which would allow the prosecutor to say if you won't follow the precedent we want a stay and we're gonna go to the Court of Appeals and get it fixed. You don't see those now because we don't have a rule that allows reservation of the issue, and we don't have a rule that allows a stay in that circumstance. The only ones you would see – and they are rare, thankfully – is when the judge requires the prosecutor to prove an element that isn't an element. Those don't happen a lot, the others happen more often, but you'll never see those unless something like A or B is enacted. And my only other comment would be – in the written comments I sent in I noted that usually when the Court proposes an alternative it's because they're inconsistent – you can only adopt one or the other. I think you ought to adopt both A and B –

CHIEF JUSTICE YOUNG: So I noticed.

MR. BAUGHMAN: because A allows the judge to defer but as your honor pointed out doesn't require it, but it does nothing for the egregiously wrong decision that the prosecutor wants to try to get the judge to reconsider or get reviewed, and B allows in any circumstance whether the judge reserves or doesn't reserve. The prosecutor just says hey, you're wrong, here's the case that shows that, and if you won't believe me here's – you want a 24-hour stay. They're not incompatible, and we would urge both be adopted.

CHIEF JUSTICE YOUNG: If you had to choose, however –

MR. BAUGHMAN: We'd choose B.

CHIEF JUSTICE YOUNG: Thank you.

MR. BAUGHMAN: Thank you.

JUSTICE ZAHRA: One question Mr. Baughman. Have you applied for your absentee ballot?

MR. BAUGHMAN: Yes, I have, as has my wife.

CHIEF JUSTICE YOUNG: Thank you. We'll move on now to Item 3 which is 2011-03 concerning whether to adopt an amendment to MCR 9.113 to clarify what the scope of the grievance administrator's discretion is concerning the answer and supporting documents. And welcome, Ms. Bullington.

Item 3 – 2011-03 – MCR 9.113

MS. BULLINGTON: Good morning. Cynthia Bullington appearing on behalf of the Grievance Administrator and in opposition to the proposed amendment. Essentially, the proposed amendment seeks to cure a harm that's not present. In approximately 20 instances per year of the approximately 3,000 grievances that get filed against attorneys, the administrator exercises discretion and chooses not to send a copy of the answer to the complainant. And there are three general situations in which that occurs. One in which –

CHIEF JUSTICE YOUNG: May I just –

MS. BULLINGTON: Yes, sir.

CHIEF JUSTICE YOUNG: ask a question. Obviously, this Court struggled a little bit with the – what the current rule – the scope of the discretion allowed to the administrator with respect to the answer versus the supporting documents. Your view is that it's not ambiguous.

MS. BULLINGTON: I'm sorry, sir.

CHIEF JUSTICE YOUNG: Your view is the current rule is not ambiguous.

MS. BULLINGTON: Yes, sir.

CHIEF JUSTICE YOUNG: If it is, why shouldn't we – if there's a doubt as to that question, why aren't you arguing for clarification to make it clear that the administrator can do both – exercise discretion as to the answer and the supporting documents.

MS. BULLINGTON: We would not object as to that amendment to the rule, certainly. The – and for the almost 30 years I've been at the Attorney Grievance Commission I have to say there are various grievance administrators that I've worked under this is pretty much a steady state of about how many answers don't get relayed to the complainants each year. I don't think –

again, in that almost 30 years that anyone has ever filed a superintending control action against the administrator seeking to compel a release of the answer.

CHIEF JUSTICE YOUNG: My point is you would not object to a clarification making it clear – if there is an ambiguity, that the administrator has discretion as to both the answer and disclosure of the documents.

MS. BULLINGTON: Absolutely, sir.

CHIEF JUSTICE YOUNG: Okay.

MS. BULLINGTON: And with that, I thank you.

CHIEF JUSTICE YOUNG: Thank you. That leads us now to Item 4 which is 2011-06 concerning MCR 2.603 to clarify that the court clerk may enter a default judgment if the damages are less than the amount claimed in the original complaint. And we have speaking to that is Michael Buckles.

Item 4 – 2011-06 – MCR 2.603

MR. BUCKLES: Good morning your honor. Mr. Chief Justice, members of the Michigan Supreme Court, my name is Michael H.R. Buckles, I'm with the law firm of Buckles and Buckles PLC in Beverly Hills, Michigan. I'm also the Government Affairs Director of the Michigan Creditors Bar Association and I will be brief. I want to thank you for your consideration for the amendment to 2.603. This is a clarification of the rule which exhibits its intent. This rule allows the clerk to enter a default judgment when there is a sum certain prayed for in the complaint and this particular amendment makes it clear that the judgment can be entered by the clerk if it's equal to or less than the amount that was prayed for. The entire intent of the rule is that the defendant who's been served with a summons and complaint does not have a judgment for more than what was prayed for. We would ask the Court to consider this because it's not uncommon for a defendant to make a payment or receive a credit between the time of filing the complaint and the entry of the judgment. What's happened is when that happens we submit our judgments – members of the Creditors Bar submit our judgments, they're returned by the court clerk and we're asked to explain this or give an affidavit or accounting when there's really no reason to because nobody's prejudiced – the defendant's not prejudiced. We would ask the Court to consider this to save time and resources – for court clerks, the mailings, the

filings, the efilings, and so forth. We respectfully ask you to approve the rule. And lastly, the Creditors Bar has submitted amicus briefs on behalf of matters that involve debtor/creditor's rights and if we can be of any further service to the Court we'd be glad to do so. Thank you for your time.

CHIEF JUSTICE YOUNG: Thank you very much. We'll move then to Item 6 which is 2011-10, an amendment proposed for MCR 7.118 to require appointment of counsel for indigent prisoners. And we have Paul Reingold speaking to that.

MR. REINGOLD: Good morning.

CHIEF JUSTICE YOUNG: Good morning.

Item 6 – 2011-10 – MCR 7.118

MR. REINGOLD: I'm Paul Reingold from the Michigan Clinical Law Program appearing as a member of the council of the Prisons & Corrections Section of the State Bar. The chair is – John Shea is in trial in federal court this morning and asked me to speak for him. The council flagged this issue in 2010 when an increase in the number of prosecutor appeals of parole decisions and publicity about those appeals brought it to our attention. The section council studied the question, debated it, and then unanimously adopted a formal public policy position in March of 2011. We forwarded that to the Court asking for action, and you have responded with the proposed change in the rule. From the 1930s and for much of the 20th Century, prisoners actually had the right to appeal parole denials. That changed in '92 when amendments took away that right, but retained the ability of the prosecutors to appeal parole grants. In 1999, another amendment gave that right to crime victims as well. I think the section council viewed this issue as really a straightforward fairness issue. When the decision to grant parole is appealed, the prisoner's release can be delayed, often for years, while the case wends its way through the courts. Typically, the prosecution seeks a stay in these cases and often they're granted, but if the appeal is not perfected until after the prisoner has already been released, the parolee obviously risks being returned to prison immediately or later if the decision goes against him. So the stakes are high – basically we're talking about potentially years of incarceration. The section's view was that where the state is already requiring the appointment of counsel in parole revocation hearings, this ought to be a much smaller step. The loss of liberty is often longer and the complexity of the underlying case – the appeal and the

appeal process – is much more – it's just thicker and more complicated than a simple parole violation. The one issue that was raised in the section meeting was –

JUSTICE MARY BETH KELLY: Mr. Reingold?

MR. REINGOLD: Yes.

JUSTICE MARY BETH KELLY: I don't want to interrupt you, but I'm just trying to understand the basis for the appointment of counsel then – it's not constitutional, it's not statutory – it's equitable.

MR. REINGOLD: I think it's both. The section views it also as a due process issue, that's now pending in the Court of Appeals in *Berrien Co v Hill*. I'm not a criminal defense lawyer and so I can't address it. I read the briefs and I think that the prisoners' advocates have the better of the argument, so our position is, yes; the section believes it is a due process issue. But apart from that, we also think it's a fairness issue – that it ought to happen.

JUSTICE MARY BETH KELLY: Thank you.

CHIEF JUSTICE YOUNG: Why aren't you addressing then that question to the Legislature which removed the right of appeal?

MR. REINGOLD: Well, it's – there may be –

CHIEF JUSTICE YOUNG: If there isn't a – obviously, there's a case in the system, but if it is not a matter of constitutional consequence, why aren't you across the mall there talking to the Legislature?

MR. REINGOLD: I think that may very well happen if *Berrien Co v Hill* comes out against us. That might be where we go, but right now it's pending in the courts and the people behind me may address that. My time is up. If I can ask – make one more short issue. When we –

JUSTICE MARKMAN: Mr. Reingold?

MR. REINGOLD: Yes.

JUSTICE MARKMAN: I'm sorry to interrupt you. Do you have any rough estimate as to what the cost to the state would be?

MR. REINGOLD: That was one of the issues I was gonna raise. I think the cost will be quite low. There are very few of these cases, and my sense is that there was sort of a flurry of activity around 2010 and, frankly, the prosecutors have not been all that successful in the appellate courts. It's a high standard – you know a tough standard of review – a deferential standard of review, and I think as there are more losses they'll likely be fewer of these. But the raw number, it's low.

CHIEF JUSTICE YOUNG: Well, again, you are – you're now undermining your argument, are you not? If this is a declining problem, why should we act particularly if there's a case in the system that has constitutional dimension?

MR. REINGOLD: What I'm saying is that the rule is necessary. If there's only one case, the rule is necessary, Justice Young. It seems to me the array of lawyers against the prisoner is large and expanding. There's a bill pending in the Senate right now – SB 1214 – which would add the Attorney General to the list of people who can appeal a grant of parole. I don't know if this is gonna get out of committee – it may not – but just the fact that it's been introduced means there could potentially now be a lawyer for the victim, a lawyer for the prosecutor, a lawyer for the state, and no lawyer for the one person whose liberty is at stake.

CHIEF JUSTICE YOUNG: Again, if you're – you're arguing a policy issue – short of the constitutional dimension you're saying it isn't fair to have all these people arrayed against a prisoner – that's a policy question – is it not – and it has some cost associated. And I guess I'm trying to figure out why we should act particularly now that you've indicated that there's a case pending that has – raises the due process question.

MR. REINGOLD: What I'm saying is that with or without the due process clause, I think it's what the Court should do. My own view is that it is a due process violation, but I'm not a criminal defense lawyer and I'm not a parole lawyer, and so I'm not the person to address that, but there are people behind me who may.

CHIEF JUSTICE YOUNG: You can conclude your remarks.

MR. REINGOLD: Yes. The last –

JUSTICE MARKMAN: Mr. Reingold?

MR. REINGOLD: Yes.

JUSTICE MARKMAN: You would have been here nonetheless even if you had failed to prevail already in that *Hill* case, is that correct? You would have been making the same argument to the Court.

MR. REINGOLD: That's exactly right, yes.

JUSTICE MARKMAN: Okay.

CHIEF JUSTICE YOUNG: You may now conclude your remarks.

MR. REINGOLD: So the very last issue is – and this was raised in the council – was why doesn't the Attorney General's office, which represents the parole board, why isn't that also representing the interest of the prisoner. And we were lucky in the council to have on the council from the Department of Corrections the then director of the office of legal affairs and he was very clear that the AG's office only represents the Board itself, it does not treat the prisoner as the client and, in fact, never talks to the prisoner. Thank you very much.

CHIEF JUSTICE YOUNG: Thank you. Lisa Speaker – or Liisa Speaker.

MS. SPEAKER: Good morning. Liisa Speaker on behalf of the Appellate Practice Section, I'm the immediate past-chair of that section. As you know, the Appellate Practice Section is a diverse group of attorneys – we have a lot of insurance defense attorneys, plaintiff attorneys, family law attorneys, some criminal attorneys – but as a group we came together, and we supported the proposal because – to answer some of the questions that have been posed here today – Justice Markman and Justice Young – about the constitutional consequences of not having counsel. And our section does believe it's a constitutional issue that an indigent defendant is defending is liberty interest because a parole board has granted parole, which means he would be free to go –

CHIEF JUSTICE YOUNG: If that's true, then we don't need the rule, correct?

MS. SPEAKER: Well, the rule – there's a lot of places in the court rules where it talks about the appointment of counsel and provides procedures to have that counsel appointed.

CHIEF JUSTICE YOUNG: If it's a constitutional right and you're indigent, you have a right to the counsel at taxpayer's expense, right?

MS. SPEAKER: Correct. But the court rule provides the procedures to make that happen, and so throughout the court rules there are places where appointment of counsel is referenced.

CHIEF JUSTICE YOUNG: Let me – let me ask the question I asked before. With that case pending, why should this Court act now before we establish the constitutional dimension of the right you seek to embed in the rule?

MS. SPEAKER: Your honor, I don't know about the case that's pending. I apologize. I've actually never done a parole board appeal, I'm not following the topic. Is it – is it a Court of Appeals case?

CHIEF JUSTICE YOUNG: If that's an accurate – I don't know either. It's been represented to us that there is a case that raises the due process question of the right to counsel in this context. If that's the case, why should we act before that case is decided?

MS. SPEAKER: Because it doesn't matter what happens with that case. If that case is decided you know in favor of the constitutional protection, the court rule's still needed to make that happen.

CHIEF JUSTICE YOUNG: If the case is resolved adverse to the constitutional claim, then you're making a policy argument, correct? It's a fairness argument.

MS. SPEAKER: Yes.

CHIEF JUSTICE YOUNG: And given that the Legislature once recognized the right of the prisoner to appeal and removed that right, why isn't that the – this fairness argument – this policy argument – best addressed to the Legislature?

MS. SPEAKER: Your honor, those are two different things. The proposal is not to give the prisoner the right to appeal, it's only that if he is brought into the appellate courts he has – if he's indigent and has been granted parole and a prosecutor or a victim appeals, then that indigent defendant would have the

right to counsel. It's not about the prior legislation which removed the right for the defendant to appeal, that's not on the table and that's not what we're talking about. We're talking about when a defendant who's indigent is brought to court and is defending his liberty interest, it – well just to give you an example – and I see I'm getting close to running out of time – basically, the appeal by the prosecutor or the victim functionally increases the defense of the defendant in one of two ways. One, because the prosecutor obtains a stay so that instead of being released the prisoner is still in prison even though the parole board has granted parole. Or, two, because eventually some court – the circuit court on appeal or the Court of Appeals or whatever – reverses the parole board, it increases the sentence that the defendant had because the parole board was prepared to release him after having served the minimum sentence and all the other requirements. If the prosecutor in the first instance, when the sentence was issued, if the prosecutor had a problem with the sentence and thought that the sentence was too short, the prosecutor could have appealed and in that instance the defendant would have a right to appointed counsel if they were indigent. And it's no different; functionally it's the same thing – that the defendant is defending his liberty interests regarding the length of the sentence.

JUSTICE MARKMAN: But isn't his liberty interest invoked and implicated too when he comes before this Court, and yet there's no such constitutional right or due process right. What's the rationality of saying there ought to be at this stage such a right, but not at this stage -

MS. SPEAKER: Um hmm. Well, I see it as two different things your honor.

JUSTICE MARKMAN: the stage at which it's determined in the first place that, yes, indeed, he is subject finally to incarceration.

MS. SPEAKER: I think they're two different things and the reason is because when an indigent defendant comes to this Court it is the indigent defendant's appeal trying to obtain liberty that he know longer has because he's had adverse rulings against him – such as a jury verdict or a plea and a sentence. In the instance of the parole board hearing, a parole board has granted parole to a prisoner who would otherwise be free to go and – but by the prosecutor or victim appealing, it's keeping him in prison because of the stay or whatever and while he's defending himself on appeal from somebody else's appeal – so when the

defendant's here it's his appeal, whereas in a parole board appeal it's the prosecutor's appeal or the victim's appeal and the defendant's on the defense not on the offense and I think there is a difference.

CHIEF JUSTICE YOUNG: You may conclude your remarks.

MS. SPEAKER: I'm done your honor. Thank you.

CHIEF JUSTICE YOUNG: Thank you very much. Arthur Cotter.

MR. COTTER: Good morning your honors. My name is Arthur Cotter, I'm the Berrien County Prosecuting Attorney. I'm here today to urge you not to approve this proposed amendment. In order to understand why I'm here and compelled to oppose this, you really have to understand the evolution of five parole cases that we've handled in Berrien County on these appeals. When they first – because this was new – prosecutors - in fact, I gave a presentation at the PAAM summer conference in 2009, most prosecutors didn't even realize you could appeal a parole decision. We started to do it because of decisions that were made in the parole board back in the end of 2008 and 2009 – these appeals. Originally, when they came in our court assigned them to the successor judge – or the sentencing judge. It kind of played out sort of like a post-sentencing motion hearing. In the very first case we did which was a second-degree murder case, my office didn't object – it didn't occur to us quite frankly at that point. The judge after hearing – because the Attorney General had intervened and had been the lead argument on the other side – ruled in our favor and ultimately blocked the parole release. The defendant at that time asked the judge for counsel to appeal his decision, and on the record the judge in that case denied that request and told the defendant – the inmate at that time – if he had it over again he wouldn't have appointed him counsel in the first place for that hearing. The very next case, another judge on a child rapist appeal release, denied the request just outright to appoint an attorney for him in that case because he found that he didn't have a right to an attorney. Subsequent to that, our chief judge got involved and basically determined that these were civil appeals of a governmental board's decision and that they should go to the civil appeal which directed to him and another judge and, in essence, he ruled that they were gonna start giving these inmates free attorneys. It was sort of a philosophical change between him and the other two judges that have ruled on them. We had a third case that came before another judge; I did oppose that. We filed briefs, we argued that there wasn't any

constitutional basis – you know there wasn't any statutory right or court rule mandated right and, in fact, the judge agreed with us, but held, based upon his inherent powers, that he felt that it was reasonable or necessary to appoint counsel that he could – and he did. We appealed that case – in the *Ronald Hills* case which is pending in front of the Court of Appeals apparently – there hasn't been a decision in that case – I believe it was argued last year. The fact of the matter is, there is an assertion on the part of the appellee in that case – appellant, excuse me – that they have a constitutional right to an attorney.

CHIEF JUSTICE YOUNG: In that case the prisoner actually was appointed counsel?

MR. COTTER: He was appointed counsel, yes, and we objected to it. Over our objection –

CHIEF JUSTICE YOUNG: I understand, but then how's the constitutional issue preserved?

MR. COTTER: Well, I'm not – we challenged it and the judge gave us leave to appeal to the Court of Appeals challenging that appointment.

CHIEF JUSTICE YOUNG: So there hasn't been a hearing yet?

MR. COTTER: There was a hearing in front of the Court of Appeals on our appeal of that point.

CHIEF JUSTICE YOUNG: I'm struggling then to understand how the constitutional – if he got what he claimed he was constitutionally entitled to, there isn't –

MR. COTTER: No, I – No, we're appealing – challenging that appointment. It's not him.

CHIEF JUSTICE YOUNG: Oh, I see. Okay.

MR. COTTER: In any event, that's still pending, and if they determine that there's a constitutional right as I think Mr. Chief Justice you pointed out this is an academic exercise and really would be procedural instead of substantive in terms of effectuating a constitutional right, but the fact of the matter is I submit and I have submitted the briefs in that case that there isn't any constitutional right based upon the cases or statutory right or any court rule mandated right unless you

change that. The key issue here today is really about the fairness, and I'm here to tell you I'm not an unfair or unreasonable guy. The fact of the matter is as we've done five cases what the appointment of this counsel in four of them anyways that the judge did appoint really has amounted to is a second attorney to write an amicus brief and to get up and argue in oral argument because it isn't very often that a defense attorney can stand there and say there's an assistant attorney general because they've intervened on every one of these cases, I agree with what he said – let my client – this murderer, child rapist, or would be murderer - out of prison. They don't have to do much – it doesn't add much – and it is not unfair to those inmates when there is an assistant attorney general arguing on behalf of the parole board, in essence, arguing for their release.

CHIEF JUSTICE YOUNG: Please conclude your remarks.

MR. COTTER: Not to spend taxpayer dollars which is wasted, it isn't fair to the taxpayers to do that, and it doesn't truly, based upon our experience, benefit the defendant.

JUSTICE MARKMAN: Mr. Cotter? Are you speaking as an individual or are you – you're not representing PAAM in this case.

MR. COTTER: I'm not representing PAAM, no.

JUSTICE MARKMAN: What is your response to Mr. Sacks's apparent argument that it's really pretty anomalous to have a circumstance such as this in which the victim's represented, the Attorney General's represented, the prosecutor's represented, but the person whose potential liberty is at stake is alone among the individuals involved and is not being represented?

MR. COTTER: Well, he's not being personally represented, but I will tell you his position is being advocated and advocated forcefully in our five appeals. The Attorney General representing the position of the parole board has prevailed three of the five times. He does have a powerful advocate on his side.

JUSTICE MARKMAN: But you think there's been a concurrence of interest in those cases.

MR. COTTER: Yes, clearly it does. It's obvious when you read the brief of the attorney who's appointed for the inmate as

well as you know review of the transcripts of the oral arguments, it's basically an amicus brief.

JUSTICE MARKMAN: What about where the assistant AG decided for one reason or another not to represent the parole board in a particular case?

MR. COTTER: As I indicated in my comment letter, if that was the situation I wouldn't be here objecting. I don't think they have a right – make sure that it's clear that I don't think they have a right to an attorney on that, but as a practical matter it's easier for us if the other side is represented by legal counsel.

JUSTICE MARKMAN: But what would you do in those cases, would you say there is an entitlement to an attorney or would it continue to be your case that there's no constitutional right implicated.

MR. COTTER: I would say that they don't have a right to that, but if the Court in equity wants to appoint them in fairness, I think that argument is stronger in those rare cases. I tried to determine if there was – how many cases that it was. To my knowledge, at least in our county, there have intervened in every one. I'm not sure there's any cases where they didn't to defend the parole board's decision – if it is, it's one or two.

CHIEF JUSTICE YOUNG: Thank you. Jonathan Sacks.

MR. SACKS: Thank you. I'll speak mainly from SADO's experience – I won't repeat the arguments of the other folks who spoke in favor of this. In *People v Osentoski*, the circuit court overruled the parole board decision to grant parole and the Attorney General as an institutional litigator said you know what this is not a case we're gonna take up – this is not the case where we're gonna defend the parole board on. We represented Mr. Osentoski; we did a leave application to the Court of Appeals. The circuit court decision was affirmed. We did a leave application to this Court. This Court reversed it and ruled it was an abuse of discretion. That never would have happened had it just been the Attorney General. In *People v Michelle Elias*, the Court of Appeals affirmed the decision of the circuit court – or denied leave – after the circuit court reversed the parole board. We did an application for leave to this Court. The Attorney General chose as an institutional

litigator that it was not a case they were gonna represent the parole board on.

JUSTICE MARY BETH KELLY: So – Mr. Sacks? You – you become aware then – you have channels in which you become aware of those cases in which representation is needed, you step in, other institutions like yours, the Innocence Project, does the same, why then is this rule necessary if capable litigators such as yourself are there for these litigants?

MR. SACKS: Justice Kelly we don't have the discretion to step in – these are cases where we've been appointed on. So this rule would, of course, require circuit courts to appoint counsel. As it stands now, some circuit court judges on their own –

JUSTICE MARY BETH KELLY: Well, let's just step back. You're appointed – you're appointed because a circuit court – you do something, do you not, to bring the case to the attention of the circuit judge. The circuit judge doesn't out of – without being – without some motion coming to him or her appoint counsel. These are cases which come to the attention of institutions like yours, like the Innocence Project, isn't that the case?

MR. SACKS: It's not actually. We can't reach out as the State Appellate Defender Office and say – and call a judge or file a motion saying please appoint us. What is – we've been appointed in two ways or in three ways. One, the judge themselves have decided to appoint an attorney – they think it's necessary. A second is a prisoner has requested it and the judge has honored the request. And a third is a case like *Piquette* where this Court appointed the State Appellate Defender Office after remanding. So the point is, these are cases where had we not been appointed that the relief would not have been granted because the Attorney General would not have otherwise made that institutional choice. The second point I wanted to make is to briefly address the *Hill* case because that is a State Appellate Defender Office case. The issue in *Hill* is the discretionary appointment of counsel – not the required appointment of counsel. And our best guess is in *Hill* – and it's impossible to say what's gonna happen although the constitutional arguments are in the mix – it will likely be a relatively narrow decision - that is the judge either or did not have the discretion in this circumstance to appoint counsel. As far as the constitutional arguments, there is such a standing problem and such a problem of who the litigator is and, frankly,

not an Innocence Clinic example because most of these folks are not innocent, that the constitutional questions - we're not necessarily sure this Court is gonna reach which is why the court rule is so important. And then the final point I want to make is we see this as the same as every other appointment of counsel issues such as discretionary counsel for collateral appeals in the motion for leave from judgment court rules, required counsel in 7.2 for leave applications and claim cases – it's a procedural piece that's this Court's discretion and we don't see it as a legislative piece. So for all those reasons we urge the Court to adopt this. We've seen too many cases where without our – without us being in the mix our clients would still be in prison and instead they're free and they deserve to be free.

CHIEF JUSTICE YOUNG: Thank you very much. Thank you. Stuart Friedman.

MR. FRIEDMAN: Good morning your honors. My name is Stuart Friedman, I'm appearing this morning as an individual attorney who has handled parole appeals on behalf of the prisoners, but I am a member of the Appellate Practice Section and I was chair of the Prison and Correction Section when the original MCR 7.104 was submitted to the Court. More importantly, I'm a veteran of the original round of parole appeals that happened in the 1990s and early 2000s, and I think a lot of that history has been forgotten. I'm not gonna be able to cover most of it in my three minutes, but some of it has been reported in – at 41 Wayne L R 177. I apologize for not submitting that in writing – that came to mind when I was hearing other people's comments. During this time period it's important to stress the Attorney General's office never appeared. We fought many parole appeals, they never once appeared. When we drafted MCR 7.104 after consulting with the Attorney General's office, we stated that the parole board may appear but they're not even named as a party. It's the county prosecutor's office versus the inmate. As Mr. Sacks has indicated, on many occasions they have not appeared at higher levels, and we have a citizen's parole board, they serve for a threshold just over cause, this was a change in 1991 after the Leslie Allen Williams murders, and it was done to make them more publicly accountable. I had a case in Monroe County two years ago where they backed away because of adverse publicity in the middle of this. So I don't think that you can say that they are a de facto attorney for the prisoner. I've never had them speak to my client even before there was representation. I've never had them order the criminal file even though the prosecutor's office has repeatedly made arguments from the trial

file about how horrific it is. I've had issues where the prosecutor is taken an appeal even though they promised at sentencing they'd take no position as to sentence, and there's a very good argument that that's a *Santobello* argument that that's an applied violation of their plea bargain agreement. It's gonna be difficult to cover all the issues, but they are so conflicted if they assume the role of the prisoner's counsel and represent the parole board that I don't think they can raise all the issues and they don't always raise all the issues. I won last year a case in Lapeer County based on material that would not have been available even in a prison law library to a prisoner who was skilled that showed that this Court's ruling in *Osentoski* was binding because she had to go to the unpublished court of appeals rulings to figure out what this Court's per curiam opinion meant and they don't have internet in prison, they don't have anything, and if you've got a prisoner who's been taken off the street – a mistake – because he's made it there, he's in the county jail, he doesn't even have the benefits of the minimal access to the court items that are provided to a prisoner in a state facility. So besides due process, I also think that there's a working access to the Court issue. I see that I'm out of time, so if the Court has any questions I'd be happy to answer them. Otherwise, thank you your honors.

CHIEF JUSTICE YOUNG: Thank you very much. The public hearing is concluded. Thank you.